Supreme Court, U.S.
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NO. _____

In The
Supreme Court of The United States
October Term, 1994

**UNITED MINE WORKERS OF AMERICA
DISTRICT 28,**

Petitioner,

v.

ISLAND CREEK COAL COMPANY

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an arbitrator may enforce a cease and desist order by use of a monetary penalty.

II. Whether refusal to allow an arbitrator to issue a penalty or punitive damages absent express authorization by the remedies portion of the arbitration agreement is violative of this Court's holding in United Paperworkers v. Misco, 484 U.S. 29 (1987).

LIST OF PARTIES

The only parties to this proceeding are named in the caption: United Mine Workers of America, District 28 as Petitioner, and Island Creek Coal Company, as Respondent.

United Mine Workers of America, District 28 is an unincorporated labor organization organized under the auspices of the United Mine Workers of America, International Union. Prior to all events giving rise to this matter, United Mine Workers of America, District 28 was granted autonomy by the United States District Court for the Western District of Virginia.

Island Creek Coal Company is a subsidiary of Occidental Petroleum,

Inc. Since the institution of this proceeding, Island Creek Coal Company has been purchased by Consolidated Coal Company. Island Creek Coal Company is not a parent of any other corporation.

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OFFICIAL AND UNOFFICIAL OPINIONS INVOLVED IN THIS CASE

The Opinion of the United States Court of Appeals for the Fourth Circuit, No. 93-2305, is contained herein at App. at 130.

The Opinion of the United States District Court for the Western District of Virginia, No. 92-0174-A is contained herein at App. at 108.

The decision of Arbitrator Cantor is contained herein in App. at 5.

There are no constitutional provisions, treaties, statutes, ordinances, and regulations involved in this case. The relevant portions of the collective bargaining agreement are set forth in App. at 1.

JURISDICTIONAL STATEMENT

The date of entry of the judgment sought to be reviewed is July 6, 1994.

There has been no request for a rehearing.

The statutory authority for this Petition for Writ of Certiorari is 28 U.S.C. Sect. 1254 (1).

STATEMENT OF THE CASE

Petitioner, United Mine Workers of America, District 28, respectfully submits this brief. For ease of reference, Petitioner will be referred to as "District 28." Respondent will be referred to as "Island Creek." The "National Bituminous Coal Wage Agreement Between Island Creek Corporation and International Union United Mine Workers

of America" will be referred to as the "BCOA agreement."

STATEMENT OF JURISDICTION OF THE COURT OF APPEALS.

The United States Court of Appeals for the Fourth Circuit had jurisdiction to consider the order of the United States District Court for the Western District of Virginia pursuant to 28 U.S.C. Sect. 1291.

FACTS

The controlling agreement is the National Bituminous Coal Wage Agreement Between Island Creek Corporation and International Union, United Mine Workers of America (hereinafter "BCOA"). The relevant portions are set forth in App. at 1.

On March 23, 1981, Arbitrator Marlyn Lugar issued an arbitration award containing a cease and desist order against the performance of classified work by supervisory personnel at Island Creek Coal Company. Arbitrator Lugar also stated that if such violations continued, punitive damages might properly be awarded in the future.

In 1990, following continuous violations of Arbitrator Lugar's cease and desist order, Local 2232 filed an action in the United States District Court for the Western District of Virginia seeking a declaration that Arbitrator Lugar's cease and desist had been violated repeatedly, injunctive relief, and punitive damages. On January 9, 1991, Judge Glen M. Williams

denied the request of Local 2232 for the following reasons:

(1) Although this action was filed as a direct Sect. 301 action, Judge Williams treated it as a suit to enforce.

(2) Judge Williams felt that the question of identity of issues, i.e., the res judicata effects, should be left to the arbitrator, therefore, he felt he could not afford the relief requested by the Union.

Supervisors performing classified work continued. In one such settlement, known as the Curtis Osborne case, the company agreed to comply with the cease and desist order issued in Arbitrator Cantor's decision.

On June 13, 1991, Arbitrator Judah awarded $2,000.00 punitive damages for violation of the company's agreement to abide by Arbitrator Lugar's cease and desist order set forth in the Curtis Osborne case settlement. In addition, Arbitrator Judah ordered the Company to "take such reasonable and practical steps as are necessary to ensure that supervisory employees cease and desist from performing classified work at the VP-5 Mine," thus recapitulating the Lugar decision's cease and desist. No challenge was made to this decision by Island Creek; ordered damages were paid.

The grievance which resulted in the matter presently before this Court was initiated on November 13, 1991. Finding

for the Union, Arbitrator Cantor awarded a penalty for violation of the cease and desist order in the amount of $1,000.00.

Island Creek filed suit in the United States District Court for the Western District of Virginia seeking to set aside that portion of the award which was termed a penalty.

REASONS FOR GRANTING THE WRIT

A. CERTIORARI SHOULD BE GRANTED TO REVERSE THE DECISION OF THE COURT BELOW BECAUSE IT IS DELETERIOUS TO LABOR POLICY AND CONTRARY TO THE DECISIONS OF THIS COURT.

Arbitrator Cantor's decision is clear that the $1,000 awarded is a penalty for Island Creek's violation of the cease and desist order first issued by Arbitrator Lugar in 1981, rather than punitive damages. Nevertheless, the

court below gave short shrift to this distinction, stating in a footnote that the penalty issued by Arbitrator Lugar was in reality punitive damages.

The Fourth Circuit ruling in this matter refuses Arbitrator Lugar the authority to enforce the cease and desist thus leaving District 28 remediless in face of continuous violations of the Agreement.

1. The Decision that Arbitrator Lugar's Penalty is "Punitive Damages", Coupled With the Determination that Punitive Damages Are Not Permitted by the Agreement, Renders the Cease and Desist Meaningless.

Beginning with the Steelworkers trilogy, continuing to the present, this Court has emphasized and reemphasized the goals sought to be reached through

the arbitration procedure and enhancement of those goals through noninterference by the judiciary. United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 574 (1960).

Thus, the labor policy set forth in the Steelworkers trilogy, i.e., arbitral flexibility, judicial deference to an arbitrator's superior knowledge of a given business, and extreme skepticism of judicial intrusion into the disputes parties have agreed to arbitrate all militate in favor of the simpler, more

efficient and less costly option of allowing the arbitrator to handle "any and all disputes that arise under the agreement." Warrior and Gulf at 583.

As noted in United Steelworkers of America v. American Manufacturing Co., 363 U.S. 574 (1960):

> Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement. . . . The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator.

Following numerous violations of the Agreement post-Arbitrator Lugar's decision, wherein the first cease and desist was issued, United Mine Workers of America, Local 2232 (the affected

Local in this action, although no longer a party), sought enforcement of the cease and desist in federal court. As noted above, enforcement was refused, in essence, since Judge Williams held that questions of res judicata and enforcement were for the arbitrator. Taking its cue from Judge Williams, District 28 began seeking a penalty, or punitive damages, from the arbitrator. The first award of punitive damages was paid, the second award of a penalty was vacated. Thus, the district court refused to consider a penalty for violation of the cease and desist, holding that enforcement was the arbitrator's domain, and the Fourth Circuit refused to enforce the remedy ultimately issued by an arbitrator.

Accepting the right of the arbitrator to issue a cease and desist, while refusing the arbitrator the right to enforce it by penalty and refusing to enforce it in federal court gut the very essence of the labor policy sought to be furthered by the Steelworkers trilogy.

2. Regardless of the Characterization of the Award as a Penalty or Punitive Damages, the Fourth Circuit Erred In Failing to Follow the Mandate of United Paperworkers v. Misco.

Subsequent to the Steelworkers trilogy, the Supreme Court has again revisited, clarified and strengthened the restraints placed upon federal courts when reviewing arbitration decisions. In W. R. Grace & Co. v.

Rubber Workers, 461 U.S. 757 (1983) this Court, in reinstating the arbitrator's decision set aside by the Fifth Circuit as against public policy, defined the limitations of the federal court in setting aside an arbitral award for public policy reasons. Specifically, this Court noted that an arbitrator's decision may only "be set aside as against public policy if the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant,' and is to be ascertained by reference to the laws and legal precedents and not from 'general considerations of supposed public interests.'" 461 U.S. at 766, quoting Muschany v. United States, 324 U.S. 49,

66 (1945).

In United Paperworkers v. Misco, 484 U.S. 29 (1987), this Court turned its attention to the deferential treatment to be afforded the remedy supplied by the arbitrator.

> "So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined. Furthermore, it must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the supplementary rules of the plant are established. . . .

> [So] long as the Arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Misco at 38.

This Court in Misco acknowledges that the parties have the right to limit the arbitrator in his choice of remedies if they so chose. Misco at 41. However, the Fourth Circuit, in adopting a rule that that punitive damages will not be permitted unless expressly authorized by the parties, presents the flip side of the Misco ruling. Where Misco demands deference to the arbitrator's remedies tempered by express language of the parties, the

Fourth Circuit requires absolute prohibition of the arbitrator absent express language to the contrary.

No longer can it be argued or assumed by the courts that punitive damages are so extraordinary that it should be assumed that the parties limited the arbitrator's discretion. Although pre-Misco courts were sometimes hesitant to permit punitive damage awards to stand, all post-Misco holdings concerning punitive damages, with the exception of the Fourth Circuit, have allowed punitive damages pursuant to general "enabling language" or in the absence of express disallowance. A review of the cases is set forth below.

It cannot be argued that the actions of Arbitrator Lugar are limited by the parties. All relevant portions of the collective bargaining agreement between the parties are including in App at 1 through 4. The arbitration jurisdictional clause is extremely broad, arguably permitting disputes that are not contractual in nature. The Agreement is silent on remedies, thus permitting punitive damages, which are now readily accepted in the majority of circuits.

3. The Opinion Below Ignores the Custom of the Parties.

Another well-established principle of labor law ignored by the court below is the particularized knowledge of the

arbitrator of the custom and practices of a particular factory or of a particular industry. Enterprise Wheel at 596. These customs become the "law of the shop."

In the present matter, Island Creek has had a cease and desist in effect since 1981; agreed to the cease and desist in its settlement of the Curtis Osborne grievance, successfully contested a federal court suit seeking to enforce the cease and desist by arguing that same was the domain of the arbitrator; paid punitive damages without protest awarded by Arbitrator Judah; did not object to the submission of the violation of the cease and desist or jurisdiction of Arbitrator Cantor to

award punitive damages or a penalty; then filed the current suit following a disfavorable ruling.

Island Creek, by its own conduct, has tacitly accepted the remedy imposed by Arbitrator Cantor and should not have been permitted to argue for the first time in federal court that the arbitrator lacked jurisdiction to issue a penalty and/or punitive damages.

B. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS, THE MAJORITY OF WHICH ARE ADHERING TO PAPERWORKERS v. MISCO.

Since United Paperworkers v. Misco, 484 U.S. 29 (1987) the treatment of punitive damages in the federal courts has rapidly evolved. Below is a brief summary of the circuits:

FIRST CIRCUIT: In Raytheon Co. v. Automated Business Systems, Inc., 882 F.2d 6, 11-12 (1st Cir. 1989), the court held that the rules of the American Arbitration Association 1/ allow the arbitrator to grant punitive damages.

SECOND CIRCUIT: No clear rule.

THIRD CIRCUIT: In the pre-Misco case of Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir.

1/The AAA rule upon by the First Circuit and other cases cited hereafter states as follows: "The Arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement.

1962) a sharply divided court denied damages on the specific facts of the case.

FOURTH CIRCUIT: The case presently before this Court presents the evolving standard of the Fourth Circuit which is now that punitive damages are not permissible unless specifically authorized by the collective bargaining/arbitration agreement.

FIFTH CIRCUIT: As early as 1975, the court, in Local 369, Bakery & C. Wkrs. I. U. v. Cotton Bak. Co., Inc., 514 F.2d 1235 (5th Cir. 1975) permits punitive damages citing the limited role of the federal courts.

SIXTH CIRCUIT: In Intern. Molders v. Brooks Foundry, Inc., 892 F.2d 1284 (6th

Cir. 1990), the court, relying heavily on Misco, appears to authorize punitive damages.

SEVENTH CIRCUIT: In Local 416, Sheetmetal Wkrs v. Helgesteel, 335 F.Supp. 812 (W.D. Wisc. 1971), aff'd 507 F.2d 1053 (7th Cir. 1974), the court, faced with an agreement which was silent concerning the arbitrator's power to fashion remedies, held that since the arbitrator arguably had the power to grant punitive damages, his award would be sustained.

EIGHTH CIRCUIT: In Lee v. Chica, 983 F.2d 883 (8th Cir. 1993), the court held that the rules of the American Arbitration Association, previously cited in footnote 1, gave the arbitrator authority to grant punitive damages.

NINTH CIRCUIT: In Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991), the court held that the rules of the American Arbitration Association, previously cited in footnote 1, gave the arbitrator authority to grant punitive damages. Interestingly, this court had previously denied punitive damages absent an express contract provision permitting them, but reversed its previous authority in the wake of Misco. See also Goss Golden v. Sheet Metal Workers, Local 104, 933 F.2d 759 (9th Cir. 1991) for this court's consideration of necessary changes in light of Misco.

TENTH CIRCUIT: No clear ruling.

ELEVENTH CIRCUIT: In Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353, 359 (N.D. Ala. 1984), aff'd 776 F.2d 269 (11th Cir. 1985) the Eleventh Circuit held that proper deference to arbitration decisions requires allowing punitive damages.

D. C. CIRCUIT: No clear ruling.

Thus, the Fourth Circuit is the only Circuit clearly clinging to the pre-Misco requirement that the contract must give express authority to the arbitrator to grant punitive damages for same to be sustainable.

SUMMARY

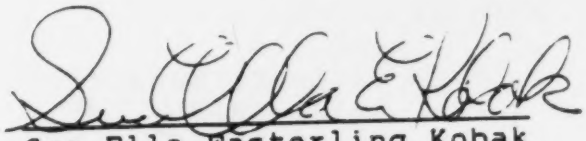
Petitioner respectfully requests that this Court grant certiorari to consider the proper standards for an arbitrator to grant punitive damages and/or a penalty for violation of a cease and desist order since:

1. The opinion of the Fourth Circuit renders the arbitrator helpless to enforce a cease and desist, which is contrary to labor policy as set forth in this Court's opinions;

2. This Court's holding in United Paperworkers v. Misco, as well as It's previous holdings require deference to the arbitral choice of remedies unless the parties choose to limit such choices; and

3. There is a conflict in the circuits concerning the proper law to apply concerning punitive damages.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 1994, in compliance with Rule 29 of the Rules of the United States Supreme Court, three true copies of the foregoing Petition for Writ of Certiorari were sent by first class mail, postage prepaid, to

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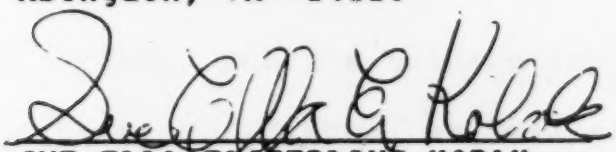

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